Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

From: Mark Krausse, Executive Director

Subject: Opinion Request of A. Lavar Taylor

Date: May 20, 2004

Executive Summary

A. Lavar Taylor is a former Assistant U.S. Attorney (Tax Division), now with a private practice specializing in civil and criminal tax controversies. Mr. Taylor ran for Governor in the October 7, 2003 statewide special election. Before the election he filed a Statement of Economic Interests, Form 700, as required by his candidacy. Mr. Taylor failed to identify as sources of income certain clients of his wholly-owned law firm. Instead, he attached a brief statement asserting the attorney-client privilege as ground for this nondisclosure. (See Attachment 1.) Regulation 18740 (Attachment 2) provides that an official need not identify a fee-paying client, if disclosure of the name would violate a privilege recognized under California law.

Under the procedure established by regulation 18740, the matter was presented to the Executive Director as an "exemption request." After further communications with Mr. Taylor (Attachments 3 and 4), staff concluded that this exemption request had merit, and I agreed. The Commission is required to approve any such exemption, however, and regulation 18740(e) provides that the official's explanation for non-disclosure shall be treated as an opinion request.[1] This memorandum outlines the reasoning behind staff's conclusion that Mr. Taylor's exemption request should be granted in a Commission Opinion. In brief, it seems that Mr. Taylor has made out a legal basis for assertion of the attorney-client privilege, and any lingering doubts on factual questions may be resolved in favor of the privilege under the peculiar circumstances of this case, since Mr. Taylor is *not* a public official subject to the Act's conflict of interest provisions.

This memorandum is accompanied by a draft Opinion for your review. (Attachment 5.) If the Commission determines that the exemption request is not warranted, a Commission order should issue requiring Mr. Taylor to identify these sources of income within 14 days by amendment of the Form 700. A draft Order to this effect is also included, as Attachment 6.

Analysis

[1] However, the procedures generally governing the issuance of Commission opinions, as set forth in regulations 18320 – 18324, do not apply to opinions issued pursuant to regulation 18740.

1. A Threshold Question on the Scope of Regulation 18740

Regulation 18740 creates an exception to the disclosure rules of section 87207(b), by permitting nondisclosure of persons who are sources of income, when disclosure would violate a privilege legally recognized by California law. It has been argued among staff that regulation 18740 cannot be applied to an unsuccessful candidate like Mr. Taylor. The argument grows out of the wording of the first sentence of the regulation, which applies the exception to "an official:"

> "An official need not disclose under Government Code Section 87207(b) the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law."

The term "official," as it is used in this regulation, does not have a self-evident meaning. Its resemblance to the defined term "public official" may suggest an affinity between the terms, *or* a distinction between them, *or* a simple failure to recognize the resemblance and its potential for confusion. The only clear fact is that this regulation avoids the term "public official."

If the "official" referenced here means "public official" as defined by the Act, the scope of the regulation would be limited to "every member, officer, employee or consultant of a state or local government agency," excluding "candidates" who are not *also* "public officials."[2] But there is nothing in the language of the regulation which compels that reading. Rather, it appears that the term is ambiguous, forcing us to inquire further into its meaning in this regulation.

The drafting history is unhelpful. The first sentence of the present regulation is identical to the language originally adopted by the Commission on July 20, 1976. An early but undated draft of regulation 18740 begins with a "scope" sentence different from the language eventually adopted. Including handwritten edits in the surviving copy, this draft reads as follows:

> "(a) Any person required to report income under Chapter 7 who believes the disclosure of the name of a source of income required by Section 87207(b)(2) or (b)(3) would violate a legally recognized privilege may withhold that information consistent with the following procedures."

A draft dated July 11, 1975 included a different first sentence:

[2] "Public official is defined at section 82048. The essential components of this definition have not been altered since the Act was passed in 1974. The term "candidate" as defined at section 82007 has never required that a person meet the definition of "public official." Thus unsuccessful candidates for elective office, if they are not "public officials" by reason of some other office or employment, are not "public officials" under the Act.

> "(a) Any elected official or other person required to report income under Chapter 7 may apply for an exemption from the requirements of Section 87207(b)(2)."

In a draft dated July 2, 1976, the regulation had reached the form in which it was adopted two weeks later, including the first sentence quoted at the beginning of this section, where "any person" or "any elected official or other person" had been changed to "an official." The history file for the regulation contains no document explaining this change.

From the materials that remain, it is clear that the regulation moved to a version applicable only to "officials." But we don't know the reason(s) for this change, and to argue that the shift in language reflects an intent to restrict application of the regulation to "public officials" presumes that the two terms were meant to be synonymous. There is no record evidence for this, however, so it remains possible that the draft was revised for reasons other than an intent to deny a legally recognized privilege to those candidates who happened not to be "members, officers, employees or consultants of a state or local government agency."

Since the "legislative history" of regulation 18740 does not specify the persons included within the term "official," we must resort to other methods of construction, to assign a meaning to the ambiguous term that is consistent with the apparent intent of the regulation, which can be harmonized with existing law, and which does not yield a patently absurd result.

The intent of regulation 18740 is clear - to avoid the conflict of laws that would result if the Act's disclosure provisions were read in a manner that would "violate a legally recognized privilege under California law." Under the most restrictive reading, regulation 18740 permits "public officials" to assert such privileges to avoid identifying certain sources of income on their Forms 700. But statutory and common law privileges are not limited to "public officials." The physician-patient and attorney-client privileges, for example, do not require that the physician or attorney enjoy the status of "public official." An unsuccessful candidate for public office, who is not a "public official," can also have these privileges – and be required by law to assert them.[3]

Regulation 18740 would not fully serve its purpose if it failed to allow what other bodies of California law permit and, in many cases, require. Because no other regulation addresses the privilege claims of persons like Mr. Taylor, regulation 18740 should be construed if possible to include *all* persons required to file Form 700s, whether or not they are "public officials."

The principle that exceptions should be construed narrowly does not further the Act's purposes in this case. Under any reading, regulation 18740 acknowledges and accommodates

[3] Taylor cites his potential liability for wrongful disclosure of taxpayer identities under 26 U.S.C. sections 6103 and 7431. We do not have the expertise to determine whether Mr. Taylor would ultimately be held liable under these provisions if he acted by order of the Commission. But his *exposure* to client lawsuits, at the least, is clear.

established laws that prohibit certain disclosures on the Form 700. A "narrowing construction" of this regulation simply makes it ineffective, by leaving open a conflict of law in certain cases. And *those* cases are precisely the ones of *least* concern under the Act.

One obvious reason for the Act's disclosure scheme is to publicize economic interests that might influence the conduct of public business by public officials. But the Act requires the same disclosure from candidates who have *no* official position that they could (mis)use, so that the electorate may have some notice of the candidates' interests and allegiances prior to voting. An unsuccessful candidate who is not otherwise a "public official" has no official capacity for mischief, and any abiding interest in disclosure is certainly diminished once the election is over. Yet under a "narrowing construction" of regulation 18740, it is precisely the person with the least capacity to subvert the integrity of government who is denied the right to assert legally recognized privileges. It would be an absurd result to interpret regulation 18740 as permitting nondisclosure by those with a real capacity to misuse governmental decisionmaking authority, while denying the same right to those without such power.

Finally, in construing the language of a regulation, reference to the governing statute can be illuminating. Regulation 18740 expressly "interprets" section 87207(b). The terms "official" and "public official' occur *nowhere* in that statute. The statute's corresponding term is "filer," the third word in subdivision (b). The scope of the statute in the opening words of subdivision (a) is given not by a noun, but by the clause "[w]hen income is required to be reported under this article," an expression (like "filer") that plainly applies to *anyone* who files a Form 700.

In short, there is no basis in history, policy, or statute for a "narrowing construction" of regulation 18740, and there is no argument for reading the regulation in a manner that would grant to "public officials" a right to assert privileges against disclosure, while denying the same right to persons who are not even subject to the Act's conflict of interest rules.

2. The Substantive Issue – the Merits of the Privilege Claims

Assuming that Mr. Taylor is not barred *per se* from claiming a right to withhold his clients' identities, the next question is whether these particular claims are meritorious. As a preliminary matter, it is worth recalling that three years after regulation 18740 was adopted to implement section 87207(b)(2), the California Supreme Court considered a challenge to that provision in *Hays v. Wood* (1979), 25 Cal. 3d 772. Plaintiff, an attorney in private practice, had been elected to the Ukiah city council. After refusing to disclose the names of his clients as ostensibly required by the statute, the city attorney filed suit to compel compliance with the Act.

As pertinent here, the Supreme Court observed that "the Act was not intended to and did not affect or dilute the attorney-client privilege or the attorney's duty to maintain and preserve

the confidence of his clients." (*Hays, supra*, 25 Cal.3d at 784, citations omitted.)[4] The court went on to note that:

> "The attorney-client privilege, designed to protect communications between them, does not ordinarily protect the client's identity. A limited exception to this rule has been recognized, however, in cases wherein known facts concerning an attorney's representation of an anonymous client implicate the client in unlawful activities and disclosure of the clients name might serve to make the client the subject of official investigation or expose him to criminal or civil liability." (*Id*. at 785, citations omitted.)

The court acknowledged that the Commission had accurately tracked the law of privilege in its recently adopted regulation 18740, which "provides ample protection against unwarranted infringement of the attorney-client privilege in matters of this kind." (*Ibid*.)[5] Although *Hays* is now 25 years old, it is still *the* authority for balancing privilege claims against the demands of the Act and, more narrowly, it remains the last word on the "risk of prosecution" exception described in the Comment to regulation 18740 – on the strength of cases decided prior to the *Hays* opinion.

Regulation 18740(b) requires that a claimant file with his Form 700 an explanation for any nondisclosure of client names. Further:

> "The explanation shall separately state for each undisclosed person the legal basis for assertion of the privilege and, as specifically as possible without defeating the privilege, facts which demonstrate why the privilege is applicable."

Subdivision (c) permits the Executive Director to request information beyond that which was attached to the Form 700. On October 27, 2003, I sent a letter requesting such information. (Attachment 3). On November 18, 2003, Mr. Taylor responded, abandoning claims of privilege as to nine clients, but reasserting them on behalf of fourteen others. (Attachment 4.) The question now is whether the explanation provided with the initial Form 700, along with the supplementary material, provides the legal and factual justification required for a disclosure exemption.

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[4] This is, of course, further support for the preceding argument that regulation 18740 should not be read to bar any class of persons from asserting attorney-client privilege in appropriate cases.

[5] The court also found that section 87207(b), as originally drafted, violated constitutional rights of equal protection because it singled out attorneys and brokers for a lower monetary disclosure threshold, a defect soon repaired by statutory amendment. This fact is of present interest only insofar as it reminds us that a failure to accommodate legitimate claims of privilege by candidates who are not "public officials" might be struck down on constitutional grounds, even if a court could find some rational basis to exclude persons without decisionmaking authority from privilege-based exceptions to the disclosure requirements of section 87207(b).

Mr. Taylor's fundamental claim, supported by prior employment with the U.S. Attorney's office and information available on his business website, is that his law practice specializes in civil and criminal tax controversies and that, because of the nature of his practice, identification
of a particular client "is tantamount to a disclosure that the client has an existing or potential tax problem" which might attract the scrutiny of enforcement authorities. (See Attachment 4.)

Mr. Taylor appears to have satisfied the formal requirements of subdivisions (b) and (c), but in so doing he proffers the kind of claim that might be asserted by any specialized practice. This is cause for concern, but it does not invalidate a claim of privilege, if Mr. Taylor has established that disclosure "might serve to make the client the subject of official investigation or expose him to criminal or civil liability." (*Hays, supra*, 25 Cal.3d at 784.)

Additional information would make it easier to conclude that disclosure would enhance a risk of prosecution for these clients. But there are limits to the information that can be brought to bear on the issue. The question is a close call on present knowledge, but I recommend that doubts be resolved in Mr. Taylor's favor, for two reasons. First, we can debate the *degree* to which dis-closure of client identities would create or enhance a risk of prosecution, but it would be hard to argue that public disclosure of his clients' names would result in *no* enhanced risk of prosecution. Second, the public interest in post-election identification of these economic interests is relatively small, where we have an unsuccessful candidate who holds no other public office or employ-ment, and who is therefore not subject to the Act's conflict of interest provisions. Because this unsuccessful candidate has no capacity to make, participate in making, or use an official capacity to influence a governmental decision, nondisclosure of client names in this case poses no risk to the integrity of the Act's conflict of interest provisions.

3. Other Options

If the Commission concludes that Mr. Taylor's exemption request should be denied, it may order him to amend the Form 700 as provided under regulation 18740(e). A draft Order to this effect is provided as Attachment 6. If the Commission sees a need for modification of the draft Opinion provided here as Attachment 5, or requires further information or proceedings, it may direct staff accordingly and continue the matter to a future date.